Federal Communications Commission
Washington, D.C.

February 2, 2000

DOCKET FILE COPY ORIGINAL

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Re: Acceptance of Comments As Timely Filed in (Docket No. 96-98)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
for Magalie Roman Salas
Secretary

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OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

MOTION TO ACCEPT THE FILING AS TIMELY FILED

On Wednesday, January 19, 2000, Bell Atlantic was unsuccessful in its attempts to file comments in this proceeding through the Commission's Electronic Comment Filing System ("ECFS"). Bell Atlantic first became concerned there was a problem with the ECFS system at 6:00 PM after several unsuccessful attempts to file electronically. Bell Atlantic representatives spoke with Bill Cline of the Commission's Consumer Information Bureau via telephone. Mr. Cline indicated that he was aware of problems with ECFS and that he anticipated the filing function would be available later in the evening. In spite of repeated attempts, however, Bell Atlantic was not able to upload these comments through the ECFS system before the midnight deadline.

Therefore, pursuant to 47 CFR § 0.231(i), Bell Atlantic respectfully requests that the attached comments be accepted as timely filed.

Respectfully Submitted

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January 20, 2000

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996	)	
	)	

COMMENTS OF BELL ATLANTIC

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January 19, 2000

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
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COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

There is no policy or legal basis for the Commission to allow the long distance incumbents to use unbundled network elements to provide, or substitute for, special access and private line services.

Competing carriers have offered special access and private line services on a competitive basis for the better part of 15 years. This competition developed under the Commission's and like-minded state commission's pro-competition policies that created marketplace incentives for competing carriers first to invest in their own network facilities and then to collocate their own equipment in the incumbents' central offices. As a result of these policies, competing carriers' revenues already are more than half of what the so-called incumbents' receive from their competing special access and private line services. And the competing carriers' share of the

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, DC, Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company and New England Telephone and Telegraph Company.

special access and private line market is already about the same as MCI WorldCom's and Sprint's combined share of the long distance market.

The long distance incumbents ignore this competition and claim that they ought to be able to use unbundled network elements to provide (or substitute for) already competitive special access and private line services. What they are asking for is an unwarranted and impermissible windfall that is foreclosed by the Act.

From a policy perspective, requiring incumbent carriers to provide unbundled network elements at TELRIC prices to competing carriers for these services would be a complete reversal of the Commission's and the states' pro-competition policies, and would affirmatively harm competition in an already workably competitive segment of the market. The availability of unbundled network elements at TELRIC prices as substitutes for special access and private line services would not only discourage competitors from investing in their own network facilities, it would also undermine the network investments they have already made. That is why facilities based carriers like Allegiance, Intermedia and Time Warner opposed the efforts of long distance carriers to substitute unbundled network elements for special access services. In addition, incumbent carriers would have far less incentive to continue to make investments in their own network facilities.

From a legal perspective, requiring incumbents to provide access to unbundled network elements for use to provide already competitive special access and private line services would be contrary both to the Act itself and to the Supreme Court's decision construing the Act. Unbundled network elements must be provided only where access to such elements "is necessary" and where the failure to provide access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47

U.S.C. § 251(d)(2). But any number of competing carriers – including the major long distance incumbents – already have demonstrated that they provide competitive special access and private line services by using their own network facilities, rather than the incumbents' unbundled network elements. They cannot reasonably claim now that they are impaired in providing these services without access to the incumbents' unbundled network elements.

Moreover, the Act expressly permits network elements to be provided on "terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. § 251(c)(3). These terms and conditions can ensure that carriers use unbundled network elements as Congress intended – to provide competitive local exchange and associated exchange access services – rather than as substitutes for special access and private line services.

The Commission should therefore determine that carriers are not entitled to use unbundled network elements to provide or substitute for special access or private line services.

II. Competing Carriers Have Been Providing Special Access and Private Line Services on a Competitive Basis For The Better Part of 15 Years.

It is no secret that competing carriers have been building their own network facilities since the mid-1980s and using them to provide special access and private line services on a competitive basis. Competing carriers are now reporting over $5.6 billion in revenues from special access and private line service – more than 52 percent of the amount of incumbent carriers' revenues from these services. Because these competing carriers have already achieved this level of market success using their own network facilities, it is impossible to say that access to the incumbents' unbundled network elements is "necessary" or that their ability to compete would be "impaired" absent such an alternative.

The development of this competition was no accident. The Commission has a long history of fostering competition for special access services, and has long recognized that these services are uniquely competitive. In addition, states like New York have an equally long history in doing the same with private line services.[2]

Shortly after the formation of Teleport Communications Group in 1984, the Commission adopted a policy of permitting free entry for exchange access services and eliminating all barriers to entry. *Cox Cable Communications, Inc.*, Memorandum Opinion, 102 F.C.C.2d 110 (1985), *vacated as moot*, 1 FCC Rcd 561 (1986). In the wake of the Commission's policy initiative, many other companies began offering these services on a competitive basis.

This is not at all surprising because these services are particularly attractive to competitors. These services use economical fiber-optic facilities to handle large traffic volumes that can only be generated by large business customers. These large business customers are generally located in the more densely-populated areas, making them even more attractive targets for entrants building new facilities. *See* Crandall Decl. at ¶ 7. This is particularly true in the Bell Atlantic region where 20 percent of Bell Atlantic's central offices account for 93 percent of Bell Atlantic's special access revenues, and 40 percent of Bell Atlantic's central offices have no special access revenues. *Id.*

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[2] For example, the New York Commission had ordered virtual collocation in 1989 and physical collocation in 1990. *See Proceeding on Motion of the Commission To Review Regulatory Polices for Segments of the Telecommunications Industry Subject to Competition*, 103 P.U.R. 4th 1 (1989) (ordering virtual collocation) and *Proceeding on Motion of the Commission to Review Regulatory Policies for Segments of Telecommunications Industry Subject to Competition; Proceeding on Motion of the Commission to Review Telecommunications Industry Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection*, 115 P.U.R. 4th 33 (1990) (ordering physical collocation).

The Commission continued to monitor the development of competition for these services under its policies. In 1991, the Commission found that "[r]ecent changes" – "most importantly, fiber optic technology" – "have facilitated the development of competition in the provision of [local access] facilities." *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259, ¶ 2 (1991).

The following year, in 1992, the Commission created more competitive opportunities by requiring incumbent carriers to provide collocation and expanded interconnection to competitive access providers. *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order, 7 FCC Rcd 7369 (1992).

In 1994, the Commission again recognized both the feasibility and the reality of competition for these services: "interconnectors now are able to provide special access and switched transport transmission services in competition with the LECs." *Expanded Interconnection with Local Telephone Company Facilities*, Third Report and Order, 9 FCC Rcd 2718, at ¶ 4 (1994).

By 1995, competing carriers were collecting over $500 million a year in special access and private line revenues. Special Access Fact Report at 6 (Attached to Comments of USTA) ("Fact Report"). These companies were so successful that their largest customers – long distance carriers like AT&T and MCI –acquired many of them. See Fact Report at 2. Despite this wave of mergers and acquisitions, there are still more than 100 carriers providing competitive access services. *See* FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, at Figure 2 (Nov. 1997).

By 1998, competing carriers revenues increased five-fold – to $2.5 billion – over 1995 levels. Fact Report at 6. That same year, competing carriers' special access and private line revenues were about 29 percent of the amount of revenues received by the Bell companies and GTE for similar services. *Id.*

Current estimates for 1999 indicate that competing carriers more than doubled their 1998 special access and private line revenues to $5.7 billion. Fact Report at 6. This represents nearly 52 percent of the amount the Bell companies and GTE collected in 1999 from special access and private line services. *Id.*

Moreover, seven years ago, the Commission predicted that competition in these markets "could develop more rapidly than" it previously had in the long distance markets. *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7380 n.37 (1992). The Commission was right on the mark. The Commission's own report indicates that competing carriers will have a 33 percent share of the total special access and private line market in 1999, which is about the same as MCI Worldcom's and Sprint's combined share of the long distance market. *See* FCC, *Trends in Telephone Service* at Table 11 (Sept. 1999).

This competitive activity has had the expected effect on prices for special access and private line services. Indeed, outside the context of this proceeding, AT&T has conceded that there have been significant price decreases as a result of competitive pressures:

> "[D]edicated access services have been subject to inroads by competitors for several years. Indeed, many of the firms that now offer competitive local services began by offering competitive dedicated access services. As a result of this competition, AT&T has seen its unit cost per voice grade equivalent circuit decline by more than 80% since 1990."

R. Steven Davis, AT&T Vice President of Law and State Government Affairs, "Price Restructuring in Telecommunications - Best Practices to Implement the Telecommunications

Act," at 2, prepared remarks for the New Mexico State University conference on Current Issues Challenging the Regulatory Process (Mar. 9, 1999).

This competitive success was not achieved through the competitors' use of the incumbents' unbundled network elements. It was instead based on the competitors' construction of their own network facilities throughout the country. As the Commission itself explained in 1992, "a growing number of Competitive Access Providers (CAPs) have entered the access market in recent years, deploying fiber-optic rings or, in some cases, microwave systems, to serve the needs of large communications-intensive businesses, predominantly in metropolitan centers." *Expanded Interconnection with Local Telephone Company Facilities,* 7 FCC Rcd 7369, ¶ 4 (1992).

Competitors have been building their networks at a phenomenal rate and are continuing to do so. By 1995, competing carriers had deployed more than 21,000 route miles of fiber. *See* Connecticut Research, *1995/96 Local Telecommunications Competition*, 7th Ed. at Table II-2 (1995). Today, competing carriers have deployed over 160,000 route miles of fiber. New Paradigm Resources Group, Inc., *CLEC Report 2000*, Ch. 5 at 3 (Table 4) (11th ed. 2000). In fact, in every year since 1990, competing carriers have increased their collective deployment of fiber in the nation's metropolitan areas much more rapidly than have the incumbent carriers. *See* Crandall Decl. at ¶ 13.

These networks currently serve nearly 15 percent of all commercial office buildings in the country and have the ability and capacity to serve much more. *Compare* New Paradigm Resources Group, Inc., *1999 CLEC Report*, at Ch. 6, p. 23 (10th ed. 1999) (104,097 office buildings serviced by CLECs) *with* U.S. Dept. of Commerce, *Statistical Abstract of the United States 1998*, 118th ed., at Table 1229 (Oct. 1998) (705,000 commercial office buildings nationwide). Once a competing carrier has established a fiber network in a market, it is very easy and economical for the carrier to extend its facilities to nearby customers. For example, a competing carrier can reach a building within 2,000 feet of its network for an initial investment of as low as $6,200 in a major city or urban area, and it can reach a building within one mile of its network in a suburban or rural area for no more than $24,000. *See* Affidavit of Michael R. McCullough at ¶ 16, filed with Bell Atlantic's Forbearance Petition, CC Dkt. No. 99-24 (filed Jan. 20, 1999).

This competitive activity is particularly intense in the Bell Atlantic region. One analyst estimates that half of all local competition is now found in the Bell Atlantic region. *See* Legg Mason, *Telephone Wars: Local Competition Update*, August 23, 1999, p.7. As a result, approximately two thirds of Bell Atlantic's special access revenues are subject to a competitive alternative (using the Commission standard of at least one competitor with a fiber-based collocation arrangement). Crandall Decl. at ¶ 16. Additional competitors that completely bypass Bell Atlantic's network raise the level of competition even higher.

In August of last year, the Commission further acknowledged the increasing competition in the provision of interstate access services. It did so by allowing streamlined introduction of new access services, and permitting the geographic deaveraging of access services in the trunking basket. *Access Charge Reform*, 15 FCC Rcd 14221 (1999) ("Pricing Flexibility Order"). In her separate statement accompanying the Commission's Pricing Flexibility Order, Commissioner Ness noted that "[d]uring the past decade, exchange access competition has increased significantly" and that "the investment and infrastructure deployment that has occurred demonstrates a strong and irreversible trend toward a multiplicity of carriers in the marketplace."

In recognition of the competition that exists for special access services, the Commission established a new two-phase process for allowing greater pricing flexibility for incumbent local exchange carriers for all interstate access services, including special access services. In Phase I, price-cap local exchange carriers are free to offer contract rates and term discounts for services that are subject to a specified degree of competition. In Phase II, price-cap local exchange carriers are eligible to remove dedicated transport and special access services from the price cap regulation altogether if a greater level of competition for such services develops. Between 72 and 88 percent of special access revenues qualify for one or both types of relief.[3] Crandall Decl. at ¶ 16. State commissions have also provided incumbent carriers with pricing flexibility for private line services in recognition of the competitive nature of these services. *See* Summary of Pricing Flexibility in State Regulatory Plans, Attachment to Bell Atlantic Ex Parte, CC Dkt. No. 96-262 (filed Aug. 31, 1998).

As Dr. Crandall explains, in taking these deregulatory measures, "the Commission was responding to the fact that special access services have been increasingly subject to competition over the past decade." Crandall Decl. at ¶ 13. Such competition exists because the "[l]arge investments in fiber-optic networks in major cities have allowed CAPs to offer special-access services in competition with price-cap ILECs." Crandall Decl. at ¶ 13.

[3] The Commission conditioned the granting of pricing flexibility on the abandonment of downside earnings protection for all regulated services (lower formula adjustment). At the same time, the Commission is considering drastic reductions in its price caps, exposing carriers to potentially confiscatory rate levels. As a result, Bell Atlantic has not applied for pricing relief and instead has filed a petition asking the Commission to reconsider the condition it has imposed on pricing flexibility.

The fact of the matter is that these services are now competitive. Competing carriers can build their own network facilities anywhere in the country to provide special access and private line services on a competitive basis. They do not need access to the incumbent's unbundled network elements to offer competitive service. Meeting the Commission's threshold for pricing flexibility in so many areas demonstrates that competitors are already in place using a combination of their own facilities and collocation. Given the existing competition, there is no reason to conclude that additional competition would be impaired.

III. Imposing Unbundling Requirements for Special Access and Private Line Services Would Harm Competition.

From the standpoint of public policy, requiring incumbents to provide unbundled network elements to competitors for special access and private line services will affirmatively (and significantly) harm the competition that has already developed for these services under the Commission's previous rules. As Dr. Crandall explains, "[a]ny decision to allow carriers to purchase UNEs simply to use as a substitute for facilities-based special access services would represent a backward step from the Commission's policy of substituting competition for regulation to set carrier access rates." Crandall Decl. at ¶ 10.

First, the availability of network elements at TELRIC prices where competitors do not need those elements will discourage new entrants from investing in their own facilities and retard innovation. According to Dr. Crandall, "a decision to extend UNEs to a market that is already quite competitive due to large investments made by new entrants would inevitably reduce investment incentives in the entire telecommunications sector." Crandall Decl. at ¶ 24.

Professors Areeda and Hovenkamp have likewise concluded that when the government forces a company to "provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." Areeda & Hovenkamp, ¶ 771b, at 175.[4] Professor Kahn reached a similar conclusion: "if rivals can share use of whatever ILEC facilities they ask for – with their mere asking constituting sufficient demonstration that access is 'necessary' to them – at prices explicitly intended to recover only the minimum cost of supply, employing the most modern technology, it cannot but have a fatally discouraging effect on their own imitative and innovative efforts: when every applicant can be a free rider, at such minimum prices, who is going to build the vehicle?" *See* Bell Atlantic Comments, Kahn Declaration at 17 (filed May 26, 1999).

Second, the requirement to make network elements available at TELRIC prices will discourage incumbent carriers from investing in and upgrading their existing networks. As Dr. Crandall explained, long distance carriers will substitute unbundled network elements for special access services, thereby reducing the incentive of incumbent carriers to invest further in network facilities.

> [R]equiring unbundling of network elements so that carriers can avoid paying special access rates that are already market driven will simply allow long-distance carriers to arbitrage existing carrier rate structures and obtain an unwarrented windfall. This arbitrage is not a deliberate regulatory process of rate rebalancing, but rather the opportunistic use of regulated wholesale rates designed to facilitate local exchange competition. . . . This opportunistic use of provisions of the 1996 Act against the ILECs will necessarily reduce their incentives to invest in network facilities.

Crandall Decl. at ¶ 22.

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[4] Here, with network element prices below competitive prices for special access, the problem is even more acute.

This arbitrage opportunity is very significant. The substitution of unbundled network elements for special access services would impose substantial reductions in the large local exchange carriers' revenues. *See* Fact Report at Table 9.

Third, requiring incumbents to unbundle the same types of network elements that competitors have already deployed will undermine those competitors' ability to compete. Having invested billions of dollars in their own facilities, they will not be able to compete effectively against other competitors that simply lease the same facilities from incumbent carriers at TELRIC prices. As Dr. Crandall explains, "were the Commission to allow carriers to obtain UNEs as substitutes for facilities-based special access services, it would undercut the new CLECs that have invested heavily in local transport facilities in most markets in the country." Crandall Decl. at ¶ 6. This is precisely why Allegiance, Intermedia and Time Warner have emphasized that allowing long distance carriers to substitute network elements for special access services would "undermine the investments that facilities-based carriers have already made in competing facilities." *See Ex Parte* Letter from Allegiance, Intermedia, Time Warner and Bell Atlantic (Sept. 2, 1999).

IV. Requiring Incumbent Carriers to Provide Unbundled Network Elements For Use By Competing Carriers to Provide Special Access and Private Line Services Would Be Contrary to the Act.

From a legal standpoint, requiring incumbents to provide unbundled network elements to provide (or substitute for) special access and private line services would be contrary to the standards imposed by the Act. The Act's unbundling requirements are designed to give competitors access to the incumbents' network elements where they need them in order to provide a competing service. But competitors have already shown they can provide special access and private line services on a competitive basis by using their own network facilities. They do not need access to the incumbents' unbundled network elements to provide special access and private line services.

A. Competitors are not impaired in providing special access and private line services on a competitive basis.

Section 251(d)(2) provides for unbundling of network elements only where "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). By its express terms, this statutory test must be applied to the specific service that the requesting carrier is planning to provide. And where competing carriers are already providing particular telecommunications services (e.g., special access) without using the incumbents' network elements, this statutory threshold for unbundling is not and cannot be met.[5]

The Supreme Court concluded that section 251(d)(2) requires the Commission to apply a limiting standard that is rationally related to the goals of the Act. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1998). It instructed the Commission not to "blind itself to the availability of

[5] As the Commission recently noted, some private line services are services "offered on a non-switched basis to particular institutions and private businesses, rather than services offered to the public indiscriminately." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, *et al.*, ¶ 25 n. 61 (rel. Dec. 23, 1999). To the extent the service at issue is private and not a common carrier service, it is not subject to the unbundling requirements of the Act. The duty to provide unbundled elements applies only to a "telecommunications service." 47 U.S.C. § 251 (c) (3). Section 3(47) defines the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." "[T]he definition of 'telecommunications service' in which the phrase 'directly to the public appears' is intended to encompass only telecommunications provided on a common carrier basis." *Federal State Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 785 (1997). As a result, non-common carrier services do not fall within the "telecommunications services" definition and are not subject to the unbundling requirement.

elements outside the incumbent's network." *Id.* at 735. It also concluded that the Commission cannot assume that "*any* increase in cost (or decrease in quality) imposed by denial of a network element . . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services . . . ." *Id.*

On remand, the Commission acknowledged that "[s]ection 251(d)(2)(B) requires us to consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer." UNE Remand Order ¶ 81 (emphasis in original). In conducting a service-by-service unbundling analysis, the Commission "recognize[d] that the existence of some significant level of competitive LEC facilities deployment is probative of whether competitive LECs are impaired from providing service within the meaning of section 251(d)(2)" and "f[ou]nd the marketplace to be the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter." UNE Remand Order, ¶¶ 53, 66.

Under the standards articulated by the Commission, competing carriers are not entitled to unbundled network elements to provide special access and private line services. Competing carriers are already providing these services in the marketplace and their share of the market is nearly 33 percent. This demonstrates the availability of competitive alternatives for special access and private line services "as a practical, economic and operational matter."

Moreover, since competing carriers provided special access and private line services long before the 1996 Act created unbundled network elements, they have successfully competed without any access to unbundled network elements. They have instead competed successfully through significant deployment of their own network facilities (or by obtaining facilities from third parties). In addition, the Commission's *Expanded Interconnection* regime made collocation available to "all parties who wish to *terminate their own special access transmission facilities* at LEC central offices." *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, ¶ 65 (1992) (emphasis supplied).

Most recently, large long distance carriers – which account for the vast majority of special access demand – have been buying up competing special access providers and thereby increased their ability to self-supply special access. Analysts expect WorldCom – through its previous acquisitions of MFS and Brooks Fiber – to provide MCI with more than 70 percent of its access capacity, and AT&T – through its purchase of TCG – is expected to avoid a significant portion of ILEC access services as well. *See* Salomon Smith Barney, "WorldCom, Inc. Company Report," April 9, 1998 and Prudential Securities, "AT&T Company Update," January 21, 1998.

Competing carriers are clearly not impaired in their ability to provide special access and private line services without having access to incumbents' network elements on an unbundled basis. The statutory unbundling test is therefore not met with respect to any network elements to which a competing carrier seeks access in order to provide (or to substitute for) special access and private line services.[6]

Moreover, Congress expressly preserved the Commission's pre-existing system of access charges and did not replace it with an unbundling regime. And, Section 251(g) provides:

[6] It should also be noted that unbundled network elements are available only where the carrier is using them to *provide* a telecommunications service. Where a carrier seeks to substitute unbundled network elements for special access services, it is not "providing" a service at all – it is *purchasing* one. *See Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1073 (1997).

> On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier . . . shall provide exchange access . . . to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment . . . under any . . . regulation, order or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.

By incorporating the language "including receipt of compensation," Congress preserved incumbent local exchange carriers' existing rights, under Commission "regulation[s], order[s], or polic[ies]," to collect access charges from interexchange carriers. *Competitive Telecom. Assn. v. FCC*, 117 F.3d 1068, 1072 (1997). It also included an express provision, Section 251(i), that says "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201" – the provision under which the Commission regulates interstate special access charges. *See MTS and WATS Market-Structure*, 93 F.C.C.2d 241, 255 ¶ 41 (1983).

Had Congress not acted to maintain the Commission's access charge system, both incumbent carriers and new entrants would be harmed. Incumbent carriers would suffer a substantial reduction in revenues without any reduction in costs, since they would continue to provide similar, if not the same, services to interexchange carriers, but at what in many instances will be greatly reduced rates. These revenue losses would undermine the ability of incumbent carriers to deploy and maintain ubiquitous, high quality networks to the detriment of consumers and wholesale customers alike.

Competing local carriers would also suffer if Congress had not distinguished network elements from the Commission's access charge system. With incumbents charging TELRIC prices for unbundled network elements – the lowest cost for the most efficient network -- competitors could not attract business and still earn sufficient profits to make investment worthwhile. As a result, new carriers would be discouraged from building their own network facilities for special access and private line services.

B. The Act requires that unbundled network elements be made available only to provide the services that satisfy the Act's unbundling test.

Long distance carriers will undoubtedly argue that once a network element meets the Act's unbundling test for a particular service, such as local exchange service, section 251(c)(3) entitles any carrier to use that same element on an unbundled basis to provide any telecommunications service. This argument is nothing more than an attempted end run around the Act's service-specific unbundling test. Section 251(c)(3) does not give carriers the unrestricted right to use any network element for any telecommunications service. By its very terms, section 251(c)(3) makes clear that the incumbent carriers' obligation to unbundle network elements is not unqualified and that conditions – on use or otherwise – can be imposed as long as they are "just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3).

First, section 251(c)(3) states that incumbent carriers have a duty to provide unbundled network elements "to any requesting telecommunications carrier for the provision of **a** telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis supplied). The long distance carriers want to rewrite this latter clause to read "any telecommunications service" or "all telecommunications services" without restrictions. *See, e.g.,* Letter from Robert W. Quinn, Jr. to Lawrence Strickling, Attachment, August 19, 1999, at 4; Letter from Chuck Goldfarb to Larry Strickling, Attachment, August 20, 1999, at 4. But Congress plainly did not write it that way. When Congress meant "any," it wrote that term, as it did in the previous clause before "requesting telecommunications carrier." Where Congress has used a term in one place but not another, then the provisions have to be construed to give meaning to Congress' choice. *See, e.g.,* *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1364 (5th Cir. 1993) (agreeing with appellant that "[t]he use of different words or terms within a statute indicates that Congress intended to establish a different meaning for those words").

Second, even if section 251(c)(3) were written to make unbundled network elements available for the provision of "any" telecommunications service, the statute expressly permits conditions on the use of network elements that are "just, reasonable, and nondiscriminatory." In fact, this condition is necessary to further Congress' underlying objective of promoting local competition by making available unbundled network elements only where competitors need them. As explained above, competition would be affirmatively harmed in the absence of this condition because competing carriers would be discouraged from investing in their own network facilities to provide special access and private line services on a competitive basis.

The Commission has already acknowledged the reasonableness of imposing use restrictions to carry out the purposes of the Act. In its first report and order in this docket, the Commission upheld restrictions that prohibited carriers from using resold residential service to serve non-residential customers, concluding that "restrictions prohibiting such cross-class reselling of residential services are reasonable." First Report and Order ¶ 962. The Commission reached the same conclusion with respect to Lifeline and other means-tested service offerings. *Id.*

Since the Act's service-specific unbundling test is not met for special access and private line services, the Commission should determine that competing carriers are not entitled to use unbundled network elements to provide (or substitute for) special access and private line services. Competitors should be able to use loops and loop/transport combinations only where they are connected to a local switch. Where the loop or the loop/transport combination is connected to a local switch, the network elements are being used to provide basic local exchange service and not pure special access. Such a condition on the availability of network elements supports the goal of the Commission and the Act to advance local competition. At the same time, it avoids undermining the existing robust competition for special access or private line services.

CONCLUSION

Competitors have long provided special access and private line services on a competitive basis using their own network facilities. They have not been impaired by the inability to use the incumbents' network elements on an unbundled basis. The Commission should therefore not allow competing carriers to use unbundled network elements to provide (or substitute for) special access or private line services.

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January 19, 2000

Before the
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Washington, DC 20554

In the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996	))))	CC Docket No. 96-98

Declaration of Robert W. Crandall

1. I have been asked by Bell Atlantic to provide an economic analysis of whether competing carriers should be permitted to obtain unbundled elements from incumbent local exchange carriers (ILECs) in order to provide dedicated special access and private line services.[1] In so doing, I analyze the relationship between such a requirement and the Commission's pro-competitive policies for regulating access services, the growth of competition in the market for special access services, other carriers' need for such UNEs in order to provide special access and private line services, and the effect of this proposal on investment incentives for CLECs.

Qualifications

2. I am a Senior Fellow in Economic Studies at the Brookings Institution in Washington,

[1]Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98, November 5, 1999.

DC, a position that I have held since 1978.[2] Prior to that I was Acting Director, Deputy Director, and Assistant Director of the Council on Wage and Price Stability in the Executive Office of the President, and in 1974-75 I was an adviser to Commissioner Glen Robinson of the Federal Communications Commission. I was an Assistant Professor and Associate Professor of Economics at MIT between 1966 and 1974. I have written widely on telecommunications policy, the economics of broadcasting, and the economics of cable television. I am author or co-author of four books on communications policy published by the Brookings Institution since 1989: Changing the Rules: Technological Change, International Competition, and Regulation in Communications (with Kenneth Flamm), 1989; After the Breakup: U.S. Telecommunications in a more Competitive Era, 1991; Talk is Cheap: The Promise of Regulatory Reform in North American Telecommunications (with Leonard Waverman), 1996; and Cable TV: Regulation or Competition? (with Harold Furchtgott-Roth), 1996. A new book on universal service policy, co-authored with Leonard Waverman, will be published by Brookings this year. A copy of my curriculum vitae is attached.

Summary and Conclusions

3. The Commission's pro-competitive policy in interstate access services markets is working very well. Competitors have wrested a large share of special access revenues from the ILECs, and continue to expand their networks so as to serve much more. As a result, under the

[2]The views expressed herein are solely my own and should not be taken to represent the views of the Brookings Institution, its other staff members, or its Trustees.

framework adopted by the FCC for access pricing flexibility, the price-cap ILECs would already qualify for Phase I or II relief for these services in metropolitan areas that account for between 72 and 88 percent of the nation's special access revenues.

4. Allowing carriers to lease unbundled network elements (UNEs) from ILECs at rates based on forward-looking costs for the purpose of delivering special access services is simply not needed to spur the development of local competition or to enable other carriers to provide competing special access and private line services. The lack of UNEs to provide special access services surely has not been a source of impairment of competition given the enormous growth in competitive carriers' fiber-optic networks and their offerings of special-access services over their own facilities.

5. The purpose of the unbundling requirements in the 1996 Act is to facilitate the growth of local competition, not to arbitrage the local rate structure of ILECs for the benefit of long-distance carriers. The availability of UNEs as a substitute for carriers' own local transport facilities will not speed the development of local competition; it will simply permit long-distance carriers to obtain connections to their large business customers at rates that are often lower than those provided in the current workably competitive markets for special access.

6. Ironically, were the Commission to allow carriers to obtain UNEs as substitutes for facilities-based special access services, it would undercut the new CLECs that have invested heavily in local transport facilities in most markets in the country. Such a designation would also

signal a retreat from the Commission's decision to develop a "market-based" framework for measuring and promoting competition in local-access markets. It would also be a retreat from the Commission's avowed policy of substituting facilities-based competition for regulation, a policy that is working very well to attract new investment in competitive urban networks.

Special Access Services

7. Dedicated special access and private line services are normally used to serve large business customers. Special access services in particular are used primarily by long-distance carriers to originate or terminate traffic with large business customers. Because these services use dedicated fiber-optic facilities with large economies of scale, they require large traffic volumes that can only be generated by large business customers. For instance, Bell Atlantic derives 78 percent of its special access revenues from services delivered at DS-1 levels or greater. Moreover, these customers are generally located in the more densely-populated areas, making them even more attractive targets for entrants building new facilities. Bell Atlantic derives 93 percent of its special access revenues from just 20 percent of its wire centers and no special access revenues whatsoever from 40 percent of its wire centers.[3] Given this concentration of demand, entry barriers are low, and competition has flourished in the provision of dedicated special access and private line services particularly in the larger metropolitan areas.[4]

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[3] Bell Atlantic Petition for Forbearance, CC Docket 99-24, January 20, 1999, p. 9

[4] *See* Fiber Deployment Update: End of Year 1998, Industry Analysis Division, Common Carrier Bureau, September 1999. Appendix, listing cities served by CAPs.

8. Special-access services were among the first of the ILEC services opened to competition by the Commission in the 1980s. New competitive access providers (CAPs) began to provide these services over their own facilities to large business customers -- particularly to long distance carriers -- shortly after the breakup of AT&T. At first, this competition took the form of direct connections between large end users and the long distance carriers' POPs over the CAPs' own facilities. In 1992, however, the Commission further opened special access services to competition by requiring ILECs to offer collocation to competitive suppliers of access services. This allowed the competitors to connect to any end user served by an ILEC wire center simply by building direct connections between the wire center and its own facilities, in many cases the IXC's POP. In addition, the CAPs continued to expand and build their own facilities to large business customers, bypassing ILEC facilities entirely.

9. The Commission is now considering whether to require ILECs to provide carriers with UNEs to deliver special-access services despite the burgeoning competition that has developed for such services. These transport facilities are already designated as UNEs, but are limited by the Commission to end users for whom the CLEC is providing local exchange service. Long distance carriers will undoubtedly urge the Commission to end this limitation on the use of the UNEs, thereby allowing them to avoid paying for special access services provided by ILECs and their competitors by simply purchasing lower-priced UNEs despite the success of the Commission's policy of encouraging facilities-based competition in these markets.

The Commission's "Pro-Competitive Deregulatory" Policy for Interstate Access Services is Working

10. Any decision to allow carriers to purchase UNEs simply to use as a substitute for facilities-based special access services would represent a backward step from the Commission's policy of substituting competition for regulation to set carrier access rates. Nearly ten years ago, the Commission substituted price caps for detailed, cost-based regulation of interstate access services. Subsequently, well after competition for such services developed, the Commission provided guidelines for allowing ILECs pricing flexibility within this price-cap regime. Through this progression of reducing regulation and increasingly allowing competition to determine the rate structure, the Commission has allowed market forces to substitute for regulation.

11. In August, the Commission responded to the increasing competition in the provision of interstate access services by immediately removing some services from price cap regulation, allowing streamlined introduction of new services, and permitting the geographic deaveraging of services in the trunking basket.[5] In the same Order, the Commission established a new framework for allowing greater pricing flexibility for ILECs for all interstate access services, including special access services (although it has not yet established the framework for removal

[5]In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc., for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona, MSA , Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket 96-262, et.al. (Hereafter, "Pricing Flexibility Order").

of switched access services from price regulation).

12. In its August Order, the Commission stated that "... market forces, as opposed to regulation, are more likely to compel LECs to establish efficient prices."[6] (emphasis supplied) It therefore established a two-phase process for allowing price-cap ILEC pricing flexibility. In Phase I, price-cap ILECs that opt to employ the pricing flexibility framework are free to offer contract rates and term discounts for services which are subject to a specified degree of competition. In Phase II, price-cap ILECs are eligible to remove dedicated transport and special access services from the price-cap regime altogether if an extremely high level of competition for such services develops. As Commissioner Ness recognized in supporting that decision, "investment and infrastructure deployment that has occurred demonstrates a strong and irreversible trend toward a multiplicity of carriers in the marketplace." [7]

13. In allowing such pricing flexibility, the Commission was responding to the fact that special access services have been increasingly subject to competition over the past decade. Large investments in fiber-optic networks in major cities have allowed CAPs to offer special-access services in competition with price-cap ILECs. In every year since 1990, the expanding universe of CAPs has increased its fiber deployment in the nation's metropolitan areas much more rapidly than have the ILECs. (See Figure) The result is that special access (and analogous private line)

[6] Pricing Flexibility Order at 21.

[7] Pricing Flexibility Order, Separate Statement of Commissioner Susan Ness.

services have become increasingly competitive, compelling the Commission to recognize the importance of allowing the ILECs greater pricing flexibility in selling such services.

14. New Paradigm Resources Group estimates that CLEC special access and private-line revenue increased dramatically from $2.5 billion in 1998 to $5.6 billion in 1999. A study appended to USTA's filing in this proceeding estimates that in 1999, the CLECs' special access/private line revenues were 52 percent of large ILEC revenues from such services.[8] The ubiquity of these competitors was recognized by Chairman William Kennard more than 18 months ago when he told a Senate Subcommittee that "(w)e also see competition for high volume customers. Twenty percent of the local business market is being served by carriers other than the incumbent Bell Company."[9] Nine months later, R. Steven Davis of AT&T noted that this competition has dramatically reduced his company's access costs:

> "[D]edicated access services have been subject to inroads by competitors for several years. Indeed, many of the firms that now offer competitive local services began by offering competitive dedicated access services. As a result of this competition, AT&T has seen its unit cost per voice grade equivalent circuit decline by more than 80% since 1990."[10]

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[8] See the "Special Access" Report appended to USTA's comments in this proceeding.

[9] Testimony before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, June 10, 1998.

[10] "Price Restructuring in Telecommunications – Best Practices to Implement the Telecommunications Act," prepared remarks for the New Mexico State University Conference on Current Issues Challenging the Regulatory Process, March 9, 1999.

15. The number of large, well-capitalized CAPs that offer dedicated transport services in the nation's urban areas has been growing rapidly. In the most recent Fiber Deployment Update, the Common Carrier Bureau lists 17 national companies, many of which have their own facilities in 20 or more of the country's major metropolitan areas.[11] Given the ease with which these carriers can expand transport capacity once fiber-optic facilities are in place in areas of high business concentration, these carriers will be able to expand to meet future demand as it develops. Indeed, a recent analysis of the burgeoning competition among these and other CLECs pointed out that "(f)acilities-based competition is growing more rapidly than competition based on resale or unbundled loops."[12] In the Bell Atlantic region, competition is particularly intense as many of these CAPs are competing with each other and with Bell Atlantic in the major urban areas. Indeed, one analyst estimates that half of all local competition is now found in the Bell Atlantic region.[13]

16. The major price-cap ILECs are already eligible for Phase I relief for special access and dedicated transport services in approximately half of the metropolitan areas in which they operate (between 142 and 182 of 320 MSAs) because competitive carriers have collocated (with

[11] Fiber Deployment Update: End of Year 1998. Tables 14 and 15; Appendix.

[12] Legg Mason, Telephone Wars: Local Competition Update, August 23, 1999, p.7.

[13] Id.

fiber) in wire centers that cover at least 30 to 65 percent of the revenues from these services[14] Bell Atlantic calculates that approximately two thirds of its special access revenues are in wire centers that have such competition. These MSAs nationally generate 72 to 88 percent of the special access revenues for all RBOC/GTE companies. In 75 of these MSAs, the Commission's Phase II triggers are met, and these areas account for 31 percent of all special-access revenues for the RBOC/GTE companies. Thus, under current Commission rules, the RBOC/GTE companies face sufficient competition to allow special access to be removed from price-cap regulation altogether in a large number of the country's metropolitan areas.[15] Any decision now to introduce new regulatory requirements by allowing UNEs to be used as a substitute for facilities-based special access services is not only unnecessary to promote competition in dedicated transport or special-access services, but it would run the risk of reversing the progress towards market competition that the Commission has nurtured for nearly a decade.

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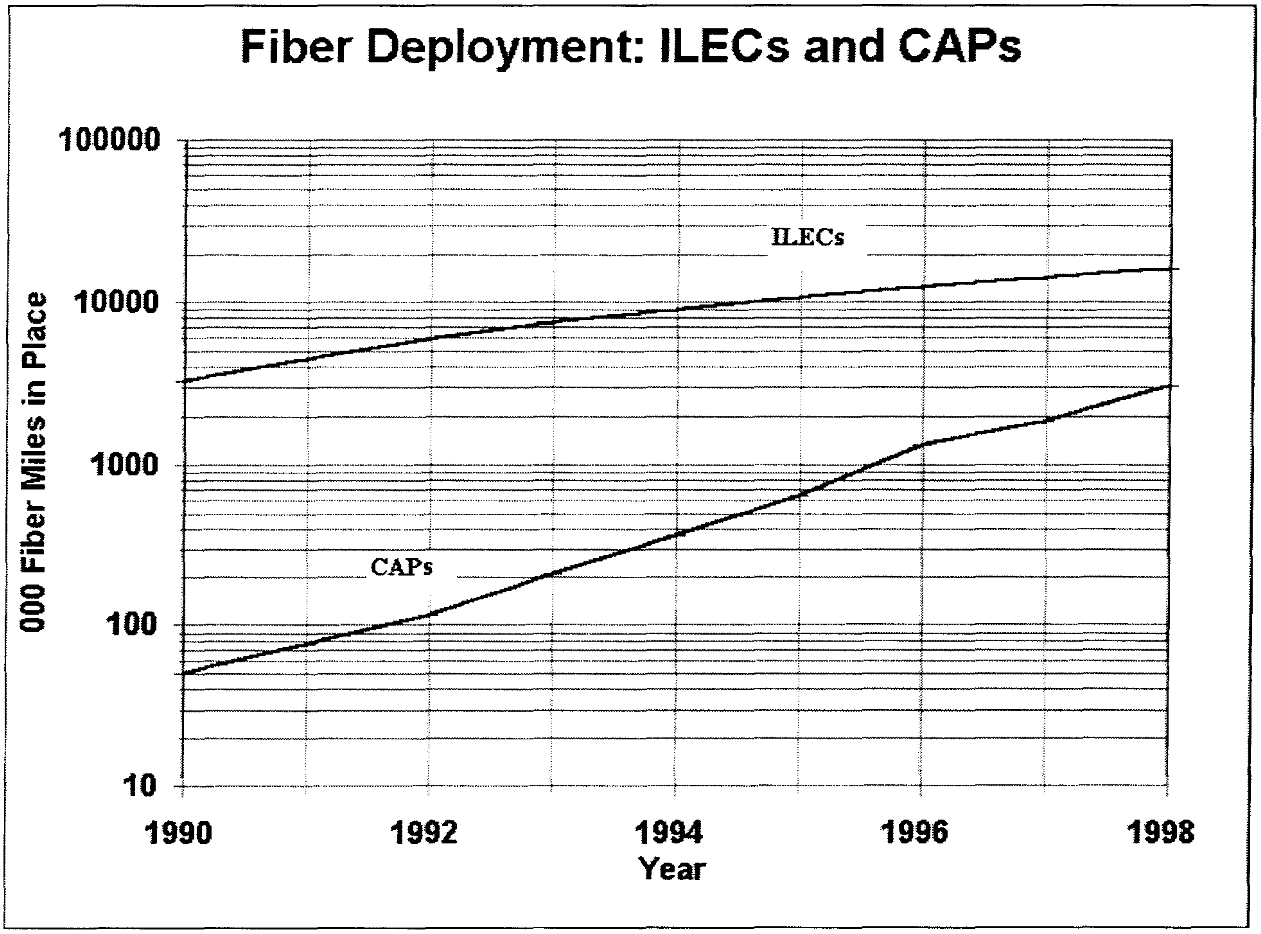
[14] Special Access Fact Report.

[15] None of the ILECs has asked for either Phase I or Phase II relief from regulation, presumably because doing so would require the sacrifice of the option for a "lower formula adjustment" to price-cap regulation in the future. Such a sacrifice would be risky in light of the myriad open regulatory issues involving unbundling, access-charge reform, productivity offsets, and universal-service reform that could affect ILEC interstate earnings.



Source: FCC, Fiber Deployment Update: End of Year 1998

The Vitality of Competition in Special Access Services Demonstrates That the Absence of UNEs Is Not a Source of Competitive Impairment.

17. Given the growth in competition in the delivery of special access services over carriers' own facilities, competing carriers have clearly demonstrated that they can provide competing special access and private line services without leasing UNEs from the incumbents. Competition continues to intensify in the market for special access services precisely because, for more than a decade, competing carriers (CLECs and IXCs alike) have been building large-scale

transport facilities in virtually every MSA in the country. New wireless carriers, such as Winstar and Teligent, are also building facilities that can deliver these services throughout the country. Indeed, the market capitalization of CLECs that are publicly traded now totals $75 billion, or roughly twice the market capitalization of the entire U.S. airline industry. Having thus raised enormous amounts of capital to build their own facilities and having deployed fiber-optic networks in most of the larger metropolitan areas of the country,[16] these competitive carriers have demonstrated that the barriers to entry in the provision of dedicated special access and private line services – including special access -- are low. Thus, it is quite clear that competing carriers have not been and will not be impaired from competing for special access services by the lack of UNEs as substitutes for CLECs' own facilities.

18. The Commission's pricing flexibility policy is based on its own observation that the markets for special access are becoming much more competitive. In its Pricing Flexibility Order, it noted that "[w]e recognize that the variety of access services available on a competitive basis has increased significantly since the adoption of our price cap rules."[17] Indeed, it prescribed new pricing flexibility rules because "[a]s the market becomes more competitive, [significant regulatory] constraints become counter-productive."[18] Nothing could be more regulatory than the prescription of cost-based network elements as substitutes for facilities-based provision of

[16] See the Appendix to Fiber Deployment Update: Year End 1998.

[17]Pricing Flexibility Order at 19.

[18] Id.

special access services.

19. Surely, if most urban transport markets are now sufficiently competitive to qualify ILECs' special access services for pricing flexibility or even removal from price caps, it is impossible to argue that these same ILECs control the underlying requisite facilities to a degree that requires them to offer these services as UNEs to competitors in the special access markets. Competitors have built their own facilities to provide these services and surely can continue to do so in the areas of concentrated business demand. They have not needed to lease UNEs to compete and surely do not need to do so now. The market for transport services is now sufficiently competitive that new CLECs can purchase transport services from existing carriers in order to offer special access services to or from IXCs' points of presence or between large business customer locations in most urban areas, if these new CLECs choose not to invest in their own capacity.

20. Nor is it necessary to require ILECs to offer UNEs as substitutes for special access in order to prevent possible predation in the market for access services. As noted, the competitors already have substantial investments in irretrievably sunk facilities. It would simply be irrational for ILECs to launch a predatory attack on CLECs with these sunk costs for they could not drive these facilities from the marketplace. Nor would it be rational to engage in such predation even if the competitors' facilities were not sunk. As I have shown, entry barriers are so low in urban dedicated transport markets that any would-be predator would be unable to recoup its losses from any predatory assault.

The Proposal Would Simply Allow Arbitrage of the ILECs' Price Structure Without Promoting Local Competition

21. The 1996 Act's requirements for UNE unbundling are designed to facilitate local exchange competition by allowing CLECs to lease those elements that they could not replicate. Therefore, requiring ILECs to offer unbundled elements to carriers who do not even provide local exchange service to the final user could not possibly facilitate the development of local competition.

22. Rather, requiring unbundling of network elements so that carriers can avoid paying special access rates that are already market driven will simply allow long-distance carriers to arbitrage existing carrier rate structures and obtain an unwarranted windfall. This arbitrage is not a deliberate regulatory process of rate rebalancing, but rather the opportunistic use of regulated wholesale rates designed to facilitate local exchange competition. This opportunistic use of provisions of the 1996 Act against the ILECs will necessarily reduce their incentives to invest in network facilities.

The Proposal to Extend UNEs to Carriers for Use as a Substitute for Special Access Would Unfairly Penalize CLECs Who Have Invested in Local Transport Facilities And Discourage Continued Investment in Competing Facilities

23. As mentioned above, competitive carriers have been investing in local transport facilities for nearly two decades. These carriers have billions of dollars irretrievably invested in

facilities -- fiber optics, electronics, ducts, and poles -- to serve the market for dedicated and shared transport in hundreds of MSAs around the country. If new carriers -- including those affiliated with long-distance companies -- were now permitted to assemble UNEs at wholesale rates based on forward-looking costs and thereby be able to offer special access services at rates that are lower than the costs of the facilities-based CLECs, these latter companies would be irreparably harmed.

24. Moreover, such a decision to extend UNEs to a market that is already quite competitive due to large investments made by new entrants would inevitably reduce investment incentives in the entire telecommunications sector. If a regulator can undercut recent entrants, who have made risky investments, simply to benefit a certain class of carriers -- namely, the long distance carriers -- future entrants will surely be more cautious about committing capital to sunk facilities. Thus, the proposal will not only reduce the incentives for long-distance companies and ILECs to invest in the transport facilities required for special access, but new entrants will be deterred in a variety of telecommunications markets which could be subjected, ex post, to competition from opportunistic exploitation of the regulatory process.

I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

1/19/00

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Federal Communications Commission

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...and Thank You for Your Comments

Your Confirmation Number is: '2000120459845 ' 1
Date Received: Jan 20 2000
Docket: 96-98
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File Name	File Type	File Size (bytes)
COMMENT	Microsoft Word	70657
COMMENT	Microsoft Word	92673

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